

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN LASCHEVER,	:	DETERMINATION
OFFICER OF WINSTON LIMOUSINE SERVICE, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1976	:	
through August 31, 1984.	:	

Petitioner, Martin Laschever, officer of Winston Limousine Service, Inc., 21 Manor Road, Medford, New York 11763, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1976 through August 31, 1984 (File No. 801896).

On September 16, 1987, the parties, by their representatives, agreed to waive their right to a hearing and to submit the case for determination based upon documentation submitted and briefs to be submitted by December 15, 1987. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was a person required to collect and/or pay over sales and use taxes on behalf of Winston Limousine Service, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue.

FINDINGS OF FACT

1. Pursuant to a field audit of Winston Limousine Service, Inc. ("WLS") which commenced in January 1984, the Audit Division, on December 20, 1984, issued to Martin Laschever (hereinafter "petitioner") three notices of determination and demands for payment of sales and use taxes due as follows:

<u>Notice No.</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>	
S841220072F 86,946.36	6/1/76-5/31/77	\$ 36,656.75		\$ 9,164.20	\$41,125.41	\$
S841220073F 90,866.83	6/1/77-11/30/80	45,222.10		11,305.54	34,339.19	
S841220074F 381,368.85	12/1/80-8/31/84	244,322.72		58,298.53	78,747.60	

Identical amounts were assessed against WLS.

2. WLS was incorporated on July 20, 1973. As of the date of commencement of the audit, WLS had never filed any sales tax returns. WLS owns and operates in excess of 130 vehicles, consisting of automobiles and vans, and it employs drivers to operate the vehicles. WLS also owns and operates an automotive repair shop with car wash and frame machines and owns extensive base radio equipment to maintain contact with and to dispatch its vehicles. It was determined, based upon an examination of available records (accountant's workpapers; Federal income tax returns with related schedules; and computer-generated general ledger, balance sheet and profit and loss statement), that tax had not been paid on fixed asset acquisitions and operating expense purchases. The entire amount at issue herein was assessed as the result of WLS's failure to pay sales tax on said fixed asset acquisitions and operating expense purchases and was assessed against petitioner due to the Audit Division's determination that petitioner was a person required to collect and/or pay over sales and use taxes on behalf of WLS.

3. For the period at issue, petitioner was the sole officer and shareholder of WLS. Petitioner does not contest the amounts of the assessment herein.

SUMMARY OF PETITIONER'S POSITION

4. Petitioner concedes that if the assessments were based upon WLS's failure to collect tax on taxable sales of tangible personal property or services, he would, under these circumstances, be personally liable for such tax as an officer within the meaning and intent of Tax Law §§ 1131(1) and 1133(a). It is petitioner's position, however, that WLS was a customer or purchaser of tangible personal property and that, while Tax Law § 1133(b) imposes liability upon a customer who has failed to pay tax to the person required to collect such tax, the Tax Law does not impose a tax liability upon the corporate officers of such customer or purchaser. Petitioner contends that Tax Law § 1131(1) was intended to place tax liability on officers or employees of corporations which breached their fiduciary duty to collect and hold taxes for the benefit of the State. Since no fiduciary relationship was breached herein, petitioner should not be held liable for the corporation's failure to pay sales and use taxes on its purchases.

CONCLUSIONS OF LAW

A. That Tax Law § 1133(a) provides, in part, that every person required to collect the taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Tax Law § 1131(1) defines "(p)ersons required to collect tax", as used in Tax Law § 1133(a), to include any officer or employee of a corporation, or a dissolved corporation who, as such officer or employee, is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law.

B. 20 NYCRR 526.11(b)(1) provides as follows:

"Every officer or employee of a corporation, or of a dissolved corporation who is under a duty to act for such corporation in complying with any requirement of the sales tax law is a person required to collect tax."

C. Tax Law § 1133(b) provides as follows:

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax

commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid."

D. Since WLS failed to pay sales tax on its fixed asset acquisitions and its operating expense purchases to the vendors who were required to collect such tax, it was required, pursuant to Tax Law § 1133(b), to file a return and pay over the tax directly to the Tax Commission (now, the Commissioner of Taxation and Finance). Petitioner, admittedly the responsible officer of WLS, was, therefore, under a duty to act for the corporation in complying with this requirement. Pursuant to Tax Law § 1133(a), he is personally liable for the sales tax imposed on WLS on its fixed asset acquisitions and operating expense purchases.

E. The petition of Winston Laschever, officer of Winston Limousine Service, Inc., is denied and the notices of determination and demands for payment of sales and use taxes due issued December 20, 1984 are hereby sustained in full.

DATED: Albany, New York
May 26, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE